gender stereotyping in *Hibbs* with the dearth of evidence of *self-care* gender stereotyping. Indeed, the Sixth Circuit noted evidence to the contrary. Pet. App. 18a (quoting H.R. Rep. No. 101-28(I), at 15 (indicating that men and women take approximately equal amounts of personal medical leave, and that medical leave is equally available to men and women)).

The Sixth Circuit then dismissed Touvell's contention that personal medical leave includes "gender-specific incidence of pregnancy-related illness and disability." Pet. App. 19a–20a. As the court concluded, among other shortcomings, this truism does not "mean that Congress had evidence that the states in particular were discriminating against women in allocating personal leave." Pet. App. 20a.

Finally, the Sixth Circuit carefully considered and rejected the argument that the self-care provision is valid prophylactic legislation to address a shortcoming of Title VII and the Pregnancy Discrimination Act (PDA), 42 U.S.C. § 2000e. Pet. App. 21a–24a. Specifically, although the PDA required equal leave between men and women, employers could comply by offering no leave at all. "As such, the argument goes, the self-care provision . . . was needed to ensure that all employers provide leave for medical conditions related to pregnancy." Pet. App. 21a. But again, Congress offered no evidence of state discrimination on this basis. Pet. App. 22a. Moreover, the court noted a fundamental difference between this purported remedy and the remedy in *Hibbs*: "By enabling fathers to take leave to care for a newborn or other family member, the [family-care provision] would decrease the gap between the incidence of such leave taken by men and women, and thereby reduce the incentive to hire men over women for fear that women would take more time off to care for family-members." Pet App. 23a. On the other hand, "if employers believe that women were more likely to take personal leave than men, a law mandating the provision of such leave to all employees would create precisely the type of incentives to hire and

promote men that the family-care provision . . . was designed to prevent." Pet App. 23a–24a.

Ultimately, this case is about the simple difference between a statutory provision designed to combat the gender stereotypes regarding who takes leave to care for an ailing family member, and another provision that addresses a different problem—the need for leave when one is personally ill. Combating gender discrimination supports the first provision, but that rationale is simply too tangential to the self-care provision to justify that provision as valid § 5 legislation. Again, of the six circuit judges who have addressed the issue since *Hibbs*, not one has challenged this sound distinction.

In the face of this straightforward conclusion, Touvell offers three arguments, but all three fail. ***First***, she asserts that the Sixth Circuit "characterized the [ ] self-care provision as targeting disability discrimination and distinguished *Hibbs* away." Pet. at 5. Not true. While the Sixth Circuit did conclude—"[a]s an initial matter," Pet App. 16a—that the self-care provision was intended to prevent employment discrimination against those with serious health problems, it then continued its analysis by assuming arguendo that the self-care provision was also an attempt to remedy some form of gender discrimination. The Sixth Circuit's analysis properly afforded Congress the extra leeway that *Hibbs* allowed when dealing with discrimination meriting heightened scrutiny. The Sixth Circuit simply concluded, however, that even with this leeway, Congress failed to establish relevant discrimination by the states. "[I]t would be inappropriate and incorrect, in light of *Hibbs*'s insistence that Congress was required to—and did—adduce evidence of pervasive gender discrimination by the states with regard to family leave, to justify the self-care provision of the Act solely on the basis of the possibility that such discrimination might also impact self-care leave, without any

concrete evidence of such a link." Pet. App. 12a n.2 (quotation marks omitted).

Second, Touvell mistakenly asserts that the Sixth Circuit, by dismissing her entire suit including her retaliation claim under 29 U.S.C. § 2615(a)(1), "effectively divides the retaliation provision into separate care compartments." Pet. at 6. She seems to argue that since the FMLA's single retaliation provision applies to both family-care and self-care claims, a retaliation claim based on the assertion of a self-care claim must survive, even if the underlying self-care claim cannot. But to the extent this argument was even preserved below, if a self-care claim for damages does not overcome Eleventh Amendment immunity, then a retaliation claim for damages *arising from the assertion of a self-care claim* suffers the same fate. Of course, the Sixth Circuit did not have occasion to decide—nor did it decide—whether the retaliation provision is completely invalid, regardless of the underlying right asserted. Nor has the Sixth Circuit somehow rewritten the retaliation provision. Rather, the court affirmed a simple and unavoidable consequence that if a plaintiff cannot get money damages against a State based on a self-care claim, then she cannot get money damages based on her related retaliation claim.

Moreover, this *secondary* issue—retaliation based on a self-care claim—is even less developed among the lower courts than the *primary* issue of the self-care provision itself. Thus, even if Touvell's brief argument on this point could somehow, someday prove meritorious, this undeveloped issue is not certworthy now.

Third, Touvell conjures the specter of a "facile syllogism" that since *Hibbs* does not lead to the conclusion that the self-care provision is a valid abrogation of Eleventh-Amendment immunity, the lower courts can invalidate the provision based solely on their own past precedent "without meaningful recourse to the *Hibbs* analytical framework." Pet.

at 6. Not so. In this case, as described above, the Sixth Circuit invalidated the self-care provision only *after* exhaustively applying the *Hibbs* framework and finding a dearth of evidence that States had discriminated against women when it comes to *personal* sick leave. This narrow holding is a far cry from the court's earlier analysis that in enacting the FMLA *as a whole*, "Congress was crafting a piece of social legislation rather than a remedy for ongoing state violations of the Equal Protection Clause." Pet. App. 6a. (quoting *Sims v. Univ. of Cincinnati*, 219 F.3d 559, 564 (6th Cir. 2000)); see also Pet. App. 9a–10a (acknowledging that the *Hibbs* Court "rejected" this analysis). That *Hibbs* does not command lower courts to uphold the self-care provision does not mean that the lower courts somehow are insulating themselves from this Court's precedent. It is *by applying* this precedent that the result obtains.

In the end, it is Touvell who engages in a flawed syllogism: *Hibbs* upheld abrogation of Eleventh Amendment immunity by the family-care provision of the FMLA. The self-care provision is also a provision of the FMLA. Therefore, she concludes, the self-care provision's abrogation of Eleventh Amendment immunity must be upheld. But unanimous circuit precedent since *Hibbs* has pierced this fallacy. And until a circuit court issues precedent to the contrary, the Court need not, and should not, give guidance.

CONCLUSION

For these reasons, the Petition should be denied.

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